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No. 93-____

IN THE

Supreme Court of the United States

October Term, 1993

BANKRUPTCY PLAN COMMITTEE
OF THE BANK BUILDING & EQUIPMENT CORP.
OF AMERICA, IN LIQUIDATION

Petitioner,

vs.

RELIANCE INSURANCE CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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54 pp

QUESTIONS PRESENTED

1. Where the trustee of a company in liquidation pursuant to a federal liquidation statute asserts claims against the company's directors and officers, are the directors and officers covered for such claims under a liability insurance policy which generally covers claims against directors and officers, including shareholders derivative claims, but excludes coverage for other claims made by or on behalf of the company?

2. Where a federal statute vests the trustee of a company in liquidation with all rights to pursue claims in the nature of shareholders derivative claims, and the trustee asserts such claims against directors and officers of the company, are the directors and officers covered for the claims under a pre-existing policy of directors and officers liability insurance, which policy expressly covers shareholders derivative claims?

LIST OF PARTIES

Petitioner Bankruptcy Plan Committee was elected by the unsecured creditors of the now-defunct Bank Building & Equipment Corporation of America and two of its wholly-owned subsidiaries to serve as trustee of their consolidated bankruptcy estates. The members of the Bankruptcy Plan Committee are H. Bernard Engel, James Burzynski, and Arthur Shafer. Richard Miller is liquidation and distribution agent for the Bankruptcy Plan Committee.

Respondent Reliance Insurance Company, a Pennsylvania corporation, issued the subject policy of directors and officers liability insurance to Bank Building & Equipment Corporation of America.

Carl J. Weis, Jr., Myron Carpenter, and Douglas Clements are former directors or officers of Bank Building & Equipment Corporation of America. They were parties in the declaratory judgment action below and retain a direct interest in the outcome of the petition.

Numerous unsecured creditors have filed claims with the bankruptcy estate of Bank Building & Equipment Corporation of America, in liquidation. The primary unsecured creditor is The Boatmen's National Bank of St. Louis. The unsecured creditors are also interested in the outcome of the petition.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit is unpublished. A notation of the decision appears at 5 F.3d 532 (8th Cir. 1993) (Table). The decision of the court of appeals is reproduced at pages 23a-24a of the Appendix to this Petition ("App. 23a-24a"). The decision of the United States District Court for the Eastern District of Missouri is published as *Reliance Insurance Co. v. Weis,* 148 Bankr. 575 (E.D. Mo. 1992), and is reproduced at App. 7a-22a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment September 23, 1993. This petition is filed within 90 days after entry of that judgment per Supreme Court Rule 13.1. This Court has jurisdiction to issue its writ of *certiorari* pursuant to 28 U.S.C. § 1254.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 from the final judgment of the district court entered December 18, 1992. The Bankruptcy Plan Committee timely filed its notice of appeal January 13, 1993.

Jurisdiction in the district court was based on complete diversity of citizenship pursuant to 28 U.S.C. § 1332. At the time the complaint was filed, plaintiff Reliance Insurance Company was a citizen of Pennsylvania, defendant Clements was a citizen of Illinois, and defendants Richard Miller, liquidation and distribution agent of the Bankruptcy Plan Committee, Weis, and Carpenter were citizens of Missouri. The amount at issue in the case is $5,000,000.

STATUTES INVOLVED

United States Bankruptcy Code.

> The trustee in a case under this title is the representative of the estate.

11 U.S.C. § 323(a).

> The commencement of a case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) ... all legal or equitable interests of the debtor in property as of the commencement of the case ....

11 U.S.C. § 541(a)(1).

STATEMENT OF THE CASE

1. The Bank Building & Equipment Corporation of America ("BBC") was a publicly traded company incorporated in Delaware in 1929 whose primary business was the design and construction of facilities for banks and other financial institutions in all fifty states and the District of Columbia.

As the result of the negligent failure some of BBC's executive officers to supervise senior management of one of its divisions (some of whom were carrying on a fraudulent scheme), BBC suffered total financial collapse, involving losses in excess of $50,000,000. BBC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code on April 30, 1990. *In re Bank Building and Equipment Corporation of America,* Case No. 90-402011-293 (Bkrtcy. E.D. Mo.). The bankruptcy court approved a plan of liquidation (the "Plan") on July 22, 1991. Relevant portions of the Plan are reprinted at App. 5a-6a.

2. Petitioner, the Bankruptcy Plan Committee, is a three-member committee created by the Plan to represent the interests of the unsecured creditors of BBC and two of its wholly-owned subsidiaries, also in bankruptcy. Under the Plan, the Bankruptcy Plan Committee serves, in effect, as trustee of the three consolidated bankruptcy estates. App. 5a-6a. Acting pursuant to the Plan, the Bankruptcy Plan Committee filed suit against three former officers of BBC in the Circuit Court for St. Louis County, Missouri. *Richard Miller v. Doug Clements, et al.,* Cause No. 630962. That case is still pending.[1]

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[1] Mr. Miller is liquidation and distribution agent for the Bankruptcy Plan Committee pursuant to the Plan. *See* App. 5a. The full name of the plaintiff in the St. Louis County action is "Richard Miller, as the Liquidation and Distribution Agent on behalf of H. Bernard Engel; James Burzynski, as the representative of Jim & Slim's Tool Supply; and Arthur Shafer, as the representative of Morgan Drive-Away, Inc., acting in the name of the Plan Committee for the Bankruptcy Estate of Bank Building and Equipment Corporation of America."

3. Prior to the officers' neglect and breach of duty, BBC had obtained a policy of directors and officers liability insurance (the "Policy") issued by Respondent, Reliance Insurance Company ("Reliance"). App. 2a-4a. The Policy remained in effect at all times relevant to this case. The Policy provides in relevant part that:

> The Insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act. ...
>
> "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.

App. 2a, 3a.

The amount of coverage provided to the directors and officers by the Policy is $5,000,000. App. 2a.

Reliance was provided with the required notice of potential claims under the Policy and, once suit was filed against the former officers, the officers demanded that Reliance provide them with a defense and indemnify them up to the Policy limits. Reliance refused coverage, claiming that the suit brought by Mr. Miller in the name of the Bankruptcy Plan Committee was excluded from coverage because of, *inter alia,* the following exclusion in the Policy:

> The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: ... by or on behalf of a Director and/or Officer, or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer.

App. 4a.[2]

4. Reliance filed the present case as a declaratory judgment action February 20, 1992 in the United States District Court for the Eastern District of Missouri, seeking a declaration that the former officers were not entitled under the Policy to coverage for the Bankruptcy Plan Committee suit.

Cross-motions for summary judgment were filed regarding the effect of the above-quoted Policy exclusion. While Reliance admitted that the Bankruptcy Plan Committee suit was not brought "by" BBC, it contended that the action was brought "on behalf of" BBC within the meaning of the Policy exclusion. The Bankruptcy Plan Committee and the former officers, arguing in support of coverage, contended, *inter alia,* that (a) in a liquidating bankruptcy in which neither the debtor nor its shareholders will receive any distribution from the estate, the bankruptcy trustee acts on behalf of the creditors, not the debtor; and (b) because, under bankruptcy law, a shareholder's right to bring a derivative action in the right of the debtor corporation vests in the bankruptcy trustee, the Bankruptcy Plan Committee's suit was the equivalent of a shareholder's derivative action for purposes of the Policy, and thus covered.

The district court acknowledged that the dispute involved issues of both contract and bankruptcy law. As to the

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[2] The exclusion, which is commonly referred to by the insurance industry as an "insured v. insured" exclusion, was not part of the original Policy but was added by Endorsement 1 to the Policy. *See* App. 10a-11a.

contract law issues, the district court concluded, "that since Reliance is the drafter of the policy and did address the issue of bankruptcy elsewhere in the policy, then it appears reasonable to conclude that if Reliance had wanted to expressly address the issue of bankruptcy in Endorsement 1, it would have done so." App. 15a.

Despite this conclusion, which would appear to require a finding of coverage under the Policy, the district court went on to examine "what is meant, under bankruptcy law, by the phrase 'on behalf of the Company'." App. 15a. The district court, after an examination of the nature of a bankruptcy estate and an analysis of the duties and powers of a bankruptcy trustee, concluded:

> It is this Court's considered opinion that pursuant to the Bankruptcy Code, the Liquidation Plan, the Disclosure Statement, and the relevant caselaw, whatever right of action BBC had against its former officers for mismanagement and breach of fiduciary duty was transferred to the bankruptcy estate upon the filing of its bankruptcy petition. Once BBC was liquidated, Agent Miller and the Plan Committee were obligated to pursue BBC's right of action in order to recover assets for BBC's estate. The purpose of the pending state court action is to recover all available funds for distribution to BBC's creditors. It is clear that the pending state court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors. For purposes of this litigation, there is no significant legal distinction between BBC and its bankruptcy estate.

App. 20a-21a.

The district court granted Reliance's motion for summary judgment and denied the motions filed by the Bankruptcy Plan Committee and the former officers. *Reliance Insurance Co. v. Weis,* 148 Bankr. 575 (E.D. Mo. 1992). App. 7a-22a.

5. The Bankruptcy Plan Committee and former officer Weis appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit. In an unpublished *per curiam* decision, the court of appeals affirmed the judgment "on the basis of the well-reasoned opinion of the district court." App. 24a.

REASONS FOR GRANTING THE WRIT

In recognition of the importance that corporations and financial institutions play in our economy and of the harm to the public that can accompany their failure, Congress has established comprehensive federal legislative schemes for the liquidation of bankrupt corporations and insolvent financial institutions. This case concerns the interplay between these federal statutory liquidation procedures and liability insurance coverage for claims of misconduct or negligence asserted by a statutory trustee against directors and officers of a failed entity. Such claims, if covered by a pre-existing policy of directors and officers liability insurance, may be one of the more valuable assets available to the trustee to satisfy the obligations of the failed entity.

Federal courts grapple with the questions presented in the petition on a regular basis as they face a steady and unending stream of bankruptcies and bank closings. In deciding these questions, however, the courts have reached conflicting answers. The lack of a definitive, uniform rule in this area is especially troublesome given that standardized insurance policies are sold throughout the United States. The courts, as well as corporations, banks, insurance companies, bankruptcy trustees, the Federal Deposit Insurance Corporation (FDIC), and the Resolution Trust Corporation (RTC), are all in

need of the Court's resolution of these important and recurring questions.

Furthermore, directors and officers liability insurance is now a mainstay of the corporate environment. Many honest and capable individuals would not accept a position as director or officer of a corporation or financial institution unless insured against suits brought against them. The decision below, by removing this important protection at a time, during the liquidation of the entity, when it would be most needed, jeopardizes the ability of corporations and financial institutions to attract qualified individuals to serve as their directors and officers.

I. THE QUESTIONS PRESENTED IN THIS PETITION ARISE FREQUENTLY.

The question of whether a claim brought by a federal statutory trustee or receiver against directors and officers of a failed entity is brought "on behalf of" the entity within the meaning of a directors and officers liability insurance policy containing an "insured vs. insured" exclusion is one which arises frequently. *See* cases cited *infra* in Section II at pp. 10-13.

One reason for the frequency with which the questions presented arise is the nature of the bankruptcy estate.

> The commencement of a [bankruptcy] case ... creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: ... all legal or equitable interests of the debtor in property as of the commencement of the case ....

11 U.S.C. § 541(a)(1).

A corporate debtor's claims against its directors and officers for breach of duty or misconduct is "property" which vests in the estate upon the filing of bankruptcy. "While

normally that fiduciary obligation is enforceable directly by the corporation, or through a stockholder's derivative action, it is, in the event of bankruptcy of the corporation, enforceable by the trustee." *Pepper v. Litton,* 308 U.S. 295, 307 (1939); *Koch Refining v. Farmers Union Central Exchange, Inc.,* 831 F.2d 1339, 1343-44, 1348 (7th Cir. 1987). "The § 541 estate, thus, includes any right of action the debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director. The trustee in bankruptcy succeeds to that right. Its nature is derivative. *See* 4 Collier on Bankruptcy ¶ 541.10[8] (15th ed. 1983)." *Delgado Oil Co., Inc. v. Torres,* 785 F.2d 857, 860 (10th Cir. 1986).

Thus the questions presented has the potential to arise in *every* bankruptcy in which (1) there is an outstanding potential claim against the directors or officers, and (2) there is in effect a policy of directors and officers liability insurance.

While most cases considering the questions presented have arisen in the context of an FDIC, FSLIC or RTC receivership liquidation of a failed financial institution, those cases are directly analogous to the present case arising out of a bankruptcy trustee's liquidation of a failed commercial corporation. *Office and Professional Employee's Int'l Union, Local 2 v. FDIC,* 962 F.2d 63, 68 & n.9 (D.C. Cir. 1992) (opinion by Ruth Bader Ginsburg, J.) (using bankruptcy law as most analogous statutory regime for deciding claim requirements under FIRREA, the Financial Institution Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1821); *Zeleznik v. Grand Riviera Theater,* 128 F.2d 533, 536 (6th Cir. 1942) (analogizing stockholder's derivative action for director's breach of fiduciary duty to claims of stockholders or depositors against the directors of national banks in liquidation).

With the ongoing consolidation of the banking industry and continuing fall-out from the failure of many of the

nation's banks and savings and loans, one can be confident that the questions presented will arise again many times in the future in the context of the liquidation of failed financial institutions.

II. THE LOWER FEDERAL COURTS ARE IN CONFLICT IN THEIR RESOLUTION OF THE QUESTIONS PRESENTED.

While most of the courts that have considered the questions presented have held that an action brought by a trustee or receiver is not brought on behalf of the debtor, a substantial minority—including the courts below—have ruled to the contrary. These conflicting decisions have led to uncertainty in the application of the federal liquidation statutes. This is most unfortunate given the need for uniformity in the application of these statutes to the interpretation of directors and officers liability insurance policies sold in standard fashion throughout this country.

A. Courts That Hold That There Is Coverage.

Many of the lower federal courts have held that the "insured vs. insured" exclusion does not apply to actions brought by a trustee or receiver who succeeds to the interests of the insured by virtue of a federal liquidation statute. Most of these courts have placed particular emphasis upon the portion of the exclusion providing coverage for shareholder derivative suits. Those courts have held that where an "insured v. insured" exclusion contains an exception from the exclusion for shareholder derivative suits, as is typically the case, the sole purpose of the exclusion is to prevent collusive lawsuits among the officers of a failing company. *American Casualty Co. v. FDIC*, 791 F. Supp. 276, 278 (W.D. Okla. 1992) ("The obvious intent ... is to protect the insurer from collusive suits"). These cases hold that the exception to the exclusion for shareholder derivative actions *compels* the conclusion that the "insured v. insured" exclusion does not

exclude coverage for actions by a successor to a defunct institution:

> This issue is decided by the existence of the exception for shareholder derivative actions in the "insured v. insured" exclusion. The existence of this exception demonstrates that [the insurer] intended to place itself on the risk for actions against the directors and officers based upon allegations of mismanagement, waste, fraud or abuse of [the bank]. These are precisely the claims being brought by FDIC against the directors and officers now. The obvious intent behind the "insured v. insured" exclusion is to protect [the insurer] against collusive suits among [the bank] and its directors and officers.

Fidelity & Deposit Co. v. Zandstra, 756 F. Supp. 429, 431 (N.D. Cal. 1990) (FDIC suit not within exclusion, even though FDIC took over suit filed by bank *before* bank became defunct (*id.* at 432)). *See American Casualty Co. v. Baker*, 758 F. Supp. 1340 (C.D. Cal. 1991), where "the Court adopt[ed] the sound reasoning of Judge Schwarzer in *Zandstra*," and concluded "there can be no real dispute that FDIC is a genuinely adverse party to the defendant officers and directors." *Id.* at 1349-50.[3] *See also American Casualty Co. v. FDIC,* 791 F. Supp. 276, 277-78 (W.D. Okla. 1992) (citing cases); *FDIC v. National Union Fire Insurance Co.,* 630 F. Supp. 1149, 1157 (W.D. La. 1986) ("to the extent that such action is analogous to a shareholders' derivative action

[3] In *Baker,* as in some of the other FDIC cases, the court held that, although the "insured vs. insured" exclusion did not exclude coverage, there was no coverage for the claim made by the FDIC by virtue of a separate exclusion, commonly known as the "regulatory exclusion", which specifically excludes coverage for losses to directors and officers resulting from claims made by the FDIC or other regulatory agencies. *Baker,* 758 F. Supp. at 1341. The regulatory exclusion is not an issue in the present case.

coverage may be provided"); *Finci v. American Casualty Co.*, 323 Md. 358, 593 A.2d 1069, 1081-82 (1991)[4].

Even where the exclusion does not expressly retain coverage for shareholder derivative actions, it has been held that the exclusion applies only to the entities *actually named* in the policy as insureds. "The endorsement lists distinctly those persons and entities to whom it applies." *FDIC v. American Casualty Co.*, No. 90-CV-0265-J, 1991 U.S. Dist. Lexis 19247 (D. Wyo. July 3, 1991); *Continental Casualty Co. v. Allen*, 710 F. Supp. 1088, 1098 (N.D. Tex. 1989) (definition of "insured" ambiguous if said to include successor like FDIC).

Furthermore, even courts which have rejected the conclusion that the sole purpose of the "insured v. insured" exclusion is the prevention of collusive suits have held that the exclusion does not bar claims by the FDIC because the FDIC also succeeds to the rights of the shareholders in the institution. "In this case, the FDIC ... can also stand in the shoes of the shareholders; therefore, as a shareholder, it has the independent authority to bring a suit ...." *FDIC v. Zaborac*, 773 F. Supp. 137, 144 (C.D. Ill. 1991), *aff'd sub nom FDIC v. American Casualty Co. of Pennsylvania*, 998 F.2d 404 (7th Cir. 1993) (not reaching issue of scope of "insured v. insured" exclusion). "FSLIC does not merely stand in the shoes of Home Savings.... [S]ince endorsement 6 does not exclude claims brought on behalf of shareholders, creditors, and the insurance fund, FSLIC's claims are covered." *Branning v. CNA Insurance Co.*, 721 F. Supp. 1180, 1184 (W.D. Wash. 1989). "[T]he stated purpose of the policy is to insure the officers and directors against loss from claims made for breach of duty. This purpose would be entirely defeated or very severely restricted if suits brought by the FSLIC were not covered. Therefore, it would not be unreasonable for such a broad exclusion, if intended, to be stated expressly."

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[4] *Finci* concerned a receiver appointed by a state deposit insurance fund analogous to the FDIC.

American Casualty Co. v. FSLIC, 704 F. Supp. 898, 901 (E.D. Ark. 1989)

B. Courts That Hold That There Is No Coverage.

Other courts have rejected the contention that a director or officer has coverage for a suit by a receiver or trustee if the policy contains an "insured v. insured" exclusion. "We find that the FDIC's action is not 'derivative' ...." *Fidelity & Deposit Co. v. Conner*, 973 F.2d 1236, 1240-41 (5th Cir. 1992). *See also* the decision below, *Reliance Insurance Co. v. Weis*, 148 Bankr. 575 (E.D. Mo. 1992), *aff'd without opp.* 5 F.2d 532 (8th Cir. 1993) (Table); *Powell v. American Casualty Co.*, 772 F. Supp. 1188 (W.D. Okla. 1991); *Gary v. American Casualty Co.*, 753 F. Supp. 1547, 1549-50, 1555 (W.D. Okla. 1990) (finding FDIC action to be a claim made by "Institution" within meaning of exclusion), *aff'd* on "regulatory exclusion" grounds only *sub nom FDIC v. American Casualty Co.*, 975 F.2d 677, 683 (10th Cir. 1992) ("unnecessary to discuss the validity and scope of the insured v. insured endorsement"); *Mt. Hawley Insurance Co. v. FSLIC*, 695 F. Supp. 469, 481 (C.D. Cal. 1987) (finding no coverage where exclusion expressly excluded coverage of "shareholders' derivative suits and/or representative class action suits"); *Evanston Insurance Co. v. FDIC*, Case No. CV88-0407 WDK (Bx), 1988 U.S. Dist. Lexis 16263 (C.D. Cal. 1988) (concluding that all claims are potentially derivative depending upon the willingness of the board to pursue the claim, and therefore only derivative claims *in esse* are within the exception to the exclusion).

III. THE COURT OF APPEALS WRONGLY DECIDED THE QUESTIONS PRESENTED.

The decision below was incorrectly decided for several reasons. First, by holding that the bankruptcy trustee acted on behalf of the debtor, the courts below erroneously ignored the separate legal existence of the estate as well as the

trustee's legal obligation to act on behalf of the creditors and, secondarily, the shareholders—not the debtor. Second, the courts below ignored the rule that, once bankruptcy is filed, the right to bring derivative actions is transferred by action of law from the shareholders to the trustee.[5]

A. The Debtor Company And Its Bankruptcy Estate Are Two Separate And Distinct Legal Entities; The Trustee Acts On Behalf Of The Creditors, Not The Debtor.

The courts below held that, in bringing suit against the former officers, the Bankruptcy Plan Committee, acting in its role as trustee in bankruptcy, was acting "on behalf of" the debtor, BBC. App. 20a-21a.[6] The Bankruptcy Code, however, specifically provides that "[t]he trustee in a case under this title is the representative *of the estate*," 11 U.S.C. § 323(a)—not the representative of the debtor. *See also Matter of Met-L-Wood Corp.*, 861 F.2d 1012, 1017 (7th Cir. 1988) ("The trustee in bankruptcy is the creditors' representative"). Furthermore, the holding of the district court adopted by the court of appeals ignored the separate legal existence of the bankruptcy estate and the debtor:

> The filing of a Chapter 11 petition does, however, cause a fundamental *legal change* in the entity. The filing entity is legally different from what it was the moment before filing, as it now assumes the mantle of a new juridical entity, a debtor-in-possession.... As a *de jure*

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[5] The courts below also erred by not applying the well-reasoned majority rule stated in the cases cited in Section II-A, *supra* at pp. 10-13.

[6] Neither the bankruptcy estate nor the bankruptcy trustee were named in the exclusion. The district court, in its opinion adopted by the court of appeals, noted that, given the numerous other provisions of the Policy dealing with bankruptcy issues, if Reliance had intended to include actions brought by a trustee in bankruptcy in the "insured v. insured" exclusion, "it would have done so." App. 15a.

> trustee, the debtor-in-possession holds its powers in trust for the benefit of creditors.

In re V. Savino Oil & Heating Co., Inc., 99 Bankr. 518, 524-25 (Bkrtcy. E.D.N.Y. 1989). "In that capacity, the trustee acts to benefit the debtor's estate, which ultimately will benefit the debtor's creditors upon distribution." *Koch Refining, supra*, 831 F.2d at 1348.

> The trustee is not the same entity as the pre-bankruptcy debtor, but is a new entity with his own rights and duties, subject to the supervision of the bankruptcy court. The trustee acts as the representative of the estate, managing its funds *for the benefit of its creditors.*

In re Fidelity America Financial Corp., 43 Bankr. 74, 77 (Bkrtcy. E.D. Pa. 1984) (emphasis added).

A few cases have held that while perhaps an ordinary successor or assignee of a defunct entity might be barred by the "insured v. insured" exclusion, the special nature of the FDIC as receiver, in which it serves as a representative of the interests not only of its predecessor bank but also its creditors and shareholders, takes the receiver outside the exclusion. *FDIC v. Zaborac*, 773 F. Supp. 137, 143-44 (C.D. Ill. 1991); *Branning v. CNA Ins. Co.*, 721 F. Supp. 1180, 1184 (W.D. Wash. 1989). Because a bankruptcy trustee, such as the Bankruptcy Plan Committee, also represents the creditors and shareholders, *Pepper v. Litton, supra; accord Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (noting that there is nothing anomalous in the trustee' actions benefiting the creditors only); the same reasoning applies here to take the Bankruptcy Plan Committee outside the exclusion.

B. Once Bankruptcy Is Filed, The Shareholders Are Barred From Bringing Derivative Actions, And Their Rights To Bring Such Actions Vest In The Trustee.

It has long been established that, once a petition in bankruptcy has been filed, the bankruptcy trustee takes over the right of the shareholders to bring an action against former directors and officers of the debtor corporation:

> While normally that fiduciary obligation is enforceable directly by the corporation, or through a shareholder's derivative action, it is, in the event of the bankruptcy of the corporation, enforceable by the trustee. For that standard of fiduciary obligation is designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.

Pepper v. Litton, 308 U.S. 295, 307 (1939). The trustee's action against the directors and officers is derivative in nature. *Delgado Oil Co., Inc., supra*, 785 F.2d at 860. The fact that the shareholders had not brought a derivative suit prior to the suit filed by the Bankruptcy Plan Committee does not make the present action any less in the nature of a derivative suit. *See Zaborac, supra*, 773 F. Supp at 144 n.5. *See also* FDIC *v. Mijalis*, 800 F. Supp. 397 (W.D. La. 1992) (action brought by FDIC without fulfilling formalities of a shareholder's derivative action is nonetheless in the nature of a shareholder's derivative action).

Once bankruptcy was filed, the shareholders were barred from bring shareholders derivative actions. "Actions for breach of fiduciary duty become property of the estate which the Trustee alone has the right to pursue after the filing of bankruptcy petition." *In re Ionosphere Clubs, Inc.*, 156 Bankr. 414, 439 (S.D.N.Y. 1993), citing *Pepper v. Litton, supra. Accord Harmsen v. Smith*, 542 F.2d 496, 500-01 n.2

(9th Cir. 1976) ("Any derivative cause of action that the shareholders may have against the directors is an asset of the bank, and may be pursued solely by the FDIC"). Only if the Bankruptcy Plan Committee were to abandon its suit, would the claim against the former officers revert to BBC to be brought on its behalf, either directly or though a shareholders derivative suit. "If the trustee chooses not to prosecute an action on behalf of the estate, the cause of action revests in the debtor, who can then assert title." *Koch Refining, supra,* 831 F.2d at 1346 n.9 and cases cited therein.

> It is true, of course, that under certain circumstances a shareholder may assert a cause of action of the debtor even after the commencement of a bankruptcy proceeding. For example, the trustee may abandon a particular claim, making it possible for others to assert it. Also, the bankruptcy court may order the trustee to abandon a claim. But in these cases, some proceeding in the bankruptcy court must take place before a shareholder can assert the right directly.

Mitchell Excavators, Inc. v. Mitchell, 734 F.2d 129, 131-32 (2d Cir. 1984) (citations omitted).[7]

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[7] Given that courts are in conflict regarding whether the "insured v. insured" exclusion applies in the present circumstances, the provision is, as a matter of law, ambiguous. "[A]n ambiguity exists when the language in a contract permits two or more reasonable interpretations." *Hallowell v. State Farm Mutual Auto. Insurance Co.,* 443 A.2d 925, 926 (Del. 1982). Under Delaware law, which is the law applicable to the contract, "ambiguity must be resolved in favor of the insured and against the insurer ...." *New Castle County v. Hartford Accident & Indemnity Co.,* 933 F.2d 1162, 1182 & n.43 (3rd Cir. 1991).

IV. THE QUESTIONS PRESENTED RAISE IMPORTANT POLICY CONCERNS.

This Court should grant its writ of *certiorari* because of the important public policy concerns raised by the decisions below.

A. The Decision Below Would Discourage Honest And Capable Persons From Serving As Directors Or Officers Of Corporations And Financial Institutions.

It is no secret that many capable and successful individuals are reluctant to serve as directors or officers of publicly-held corporations and financial institutions because of the fear that they will be subjected to lawsuits. To encourage such individuals to serve as directors, many states have enacted statutes providing that directors of publicly-held corporations shall be defended and indemnified if suits are brought against them for negligence or breach of fiduciary duty in their capacity as directors or officers. *See, e.g.*, 8 Del. C. § 145 (1992); *Merritt-Chapman & Scott Corp. v. Wolfson*, 264 A.2d 358, 360 (Del. Super. 1970) ("Indemnification statutes were enacted in Delaware, and elsewhere, to induce capable and responsible businessmen to accept positions in corporate management"). Many corporations satisfy this obligation by purchasing policies of directors and officers liability insurance. Such insurance provides the directors and officers with the assurance that should the corporation or financial institution fail—an occurrence which will be followed by suits against the directors and officers as surely as night follows day—they will be protected against actions brought on behalf of the creditors and shareholders.

The decisions below, in removing the protection of such insurance at the very moment when it is of the greatest value, cannot help but to discourage individuals from serving as

directors or officers of publicly-traded companies, a result contrary to the public policies of the several States.

B. The Decision Below Allows The Insurer To Avoid A Risk Which It Had Contractually Agreed To Assume.

Here, Reliance expressly assumed the risk of defending and indemnifying the directors and officers from claims brought against them for alleged misconduct and negligence. As a result of the decision below, Reliance has been released from this risk. This is an unjustifiable windfall for the insurer.

The filing of a bankruptcy petition is intended to protect the debtor and its creditors. The debtor is protected from collection efforts. The creditors are protected through the collection, preservation, and distribution of the debtor's property. The filing of a bankruptcy petition is not intended to protect insurance companies who have entered into insurance contracts with the debtor—and, in this case, with the former officers.[8] "The 'fresh-start' policy is not intended to provide a method by which an insurer can escape its obligations based simply on the financial misfortunes of the insured. Such a result would be fundamentally wrong." *Houston v. Edgeworth,* 993 F.2d 51, 54 (5th Cir. 1993) (citations omitted) (provider of medical malpractice insurance not released from coverage by bankruptcy and discharge of insured physician). Here, the Policy at issue specifically stated that the bankruptcy of BBC, "shall not relieve the Insurer of any of its obligations hereunder." App. 4a. The decision below, contrary to the Policy and contrary to bankruptcy law, relieved Reliance of all of its obligations under the Policy because of BBC's bankruptcy.

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[8] *See* App. 2a. While the Policy belongs to the estate, the proceeds of the Policy belong to the covered directors and officers. *Louisiana World Exposition, Inc. v. Federal Insurance Co.,* 832 F.2d 1391, 1399-1401 (5th Cir. 1987).

CONCLUSION

The petition for a writ of *certiorari* should be granted for this Court's plenary review.

Respectfully submitted,

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December 22, 1993.

APPENDIX

A. THE INSURANCE POLICY 2a

B. THE BANKRUPTCY PLAN 5a

C. THE DISTRICT COURT OPINION 7a

D. THE COURT OF APPEALS DECISION 23a

A. THE INSURANCE POLICY

DECLARATIONS

Item A Name of Insured ...

BANK BUILDING & EQUIPMENT CORPORATION OF AMERICA ...

Item C Limit of Liability $5,000,000.00 aggregate each policy year, including claim expense ...

Item E One Year Premium $40,000.00 ...

This declaration page (together with the completed and signed proposal form) and the Directors and Officers Liability Policy shall constitute the Contract between (1) the Directors and Officers and the Company and (2) the Insurer.

...

DIRECTORS AND OFFICERS LIABILITY POLICY INCLUDING COMPANY REIMBURSEMENT

In consideration of the payment of the premium ... and subject to all the terms, conditions, limitations and any endorsements to this policy, the Insurer agrees as follows:

I. INSURING AGREEMENTS

A. Directors and Officers Liability

The Insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act.

If the Company is permitted or required by law to ultimately indemnify a Director or Officer, or to advance costs and/or defense expenses on their behalf, and does not in fact do so other than for reason of the Financial Insolvency of the Company, then the Insurer shall pay all loss on behalf

of the Director or Officer, subject to the third listed deductible amount set forth in Item D, Retention, of the Declarations and all provisions, terms and conditions of this policy.

B. Company Reimbursement

The insurer will pay on behalf of the Company all loss for which the Company is required to indemnify or for which the Company has, to the extent permitted by law, indemnified the Directors and Officers, for any loss resulting from any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act.

II. EXTENSIONS

A. This policy shall cover loss arising from any claims made against ... the legal representatives or assigns of Directors or Officers in the event of their incompetency, insolvency or bankruptcy. ...

IV. DEFINITIONS

A. The term "Company" shall mean the Company shown in Item A of the Declarations and any subsidiary or subsidiaries as hereinafter defined.

B. "Directors and Officers" shall mean all persons who were, now are, or shall be duly elected Directors or duly elected or appointed Officers of the Company holding any of the officer positions created by the charter or bylaws of the Company ...

C. "Wrongful Act" shall mean any actual or alleged error or misstatement or misleading statement or act or omission or neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company.

The Wrongful Act of any Director or Officer shall not be imputed to any other Directors or Officers for the purpose of determining the applicability of the Exclusions enumerated in Section V—Exclusions.

D. "Loss" shall mean any amount which the Directors and Officers are legally obligated to pay ... for a claim or claims made against the Directors and Officers for Wrongful Acts ....

"Financial Insolvency" means the status of the Company as a debtor as that term is defined and used within the provisions of Title 11, United States Code, Bankruptcy.

V. EXCLUSIONS

The Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors or Officers: ...

(J) by or on behalf of a Director and/or Officer, or by or on behalf of the "Company", except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer. ...

VIII. GENERAL CONDITIONS ...

C. Action Against Insurer ...

Bankruptcy or insolvency of a Director or Officer or of a Director's or Officer's estate or of the Company shall not relieve the Insurer of any of its obligations hereunder. ...

F. Company Authorization

By acceptance of this policy, the Company named in Item A of the Declarations agrees to act on behalf of all Directors and Officers with respect to the giving and receiving of notice of claim ... and the Directors and Officers agree that the Company shall act on their behalf.

B. THE BANKRUPTCY PLAN

1.31 **Plan Committee** shall mean the Committee of three individual creditor representatives, selected on behalf of BBC by the BBC Unsecured Creditors Committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1), and on behalf of [the two subsidiaries] by each Debtor from its solicitation of its list of twenty largest unsecured creditors, excluding those which have a conflict of interest, which Plan Committee shall function as of and after the Confirmation Date. ...

1.20 **Liquidation and Distribution Agent** shall mean the individual appointed by the Plan Committee, who shall on the Confirmation Date be vested with authority to administer all the property of the Consolidated Debtors and their estate including causes of action ... in accordance with the Plan and under the supervision and direction of the Plan Committee. ...

12.1 This Plan contemplates the liquidation of all the property of the Consolidated Debtors ... and the prosecution of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee, through the Liquidation and Distribution Agent on behalf of the estates ....

14.7 Each member of the Plan Committee shall act in a fiduciary capacity for the interests of all Creditors and holders of issued and outstanding shares of common or preferred stock of the Consolidated Debtors ....

18.1 The Bankruptcy Court shall retain jurisdiction of this case pursuant to the provisions of Chapter 11 of the Bankruptcy Code until the entry of a final decree closing all three of the estates of the Consolidated Debtors, and with respect to the following matters:

(a) to preserve for and enable the Plan Committee and the Liquidation and Distribution Agent, for and on behalf of the estates, to consummate any and all proceedings which it

has brought or to commence any action ... to determine the extent that the Directors and Officers Liability Policy of Insurance provides coverage for the acts or omissions of the officers and former officers of BBC, and to recover any ... damages to which the estates of the Consolidated Debtors may be entitled under applicable provisions of the Bankruptcy Code, including without limitation Sections 544, 545, 547, 548, 549 and 553(b), or other federal, state or local laws ....

C. THE DISTRICT COURT OPINION

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

RELIANCE INSURANCE CO. OF ILLINOIS,

Plaintiff,

vs.

CARL J. WEIS, *et al.*,

Defendants.

No. 4:92CV296SNL

MEMORANDUM

Plaintiff has filed this declaratory judgment action seeking a declaration of its rights and obligations pertaining to a directors' and officers' liability policy it issued to a presently liquidated bankrupt corporation. Specifically, it seeks a declaration that the said policy does not provide coverage, pursuant to Endorsement 1 of the policy, for claims brought by the Plan Committee representative Miller against certain former officers of the bankrupt corporation (defendants Weis, Clements, and Carpenter). This matter is before the Court on the parties' cross-motions for summary judgment. Extensive pleadings have been filed in connection with these summary judgment motions.

Courts have repeatedly recognized that summary judgment is a harsh remedy that should be granted only when the moving party has established his right to judgment with such clarity as not to give rise to controversy. *New England Mut. Life Ins. Co. v. Null,* 554 F.2d 896, 901 (8th Cir. 1977).

Summary judgment motions, however, "can be a tool of great utility in removing factually insubstantial cases from crowded dockets, freeing courts' trial time for those that really do raise genuine issues of material fact." *Mt. Pleasant v. Associated Elec. Coop. Inc.*, 838 F.2d 268, 273 (8th Cir. 1988).

Pursuant to Fed.R.Civ.P. 56(c), a district court may grant a motion for summary judgment if all of the information before the court demonstrates that "there is no genuine issue as to material fact and the moving party is entitled to judgment as a matter of law." *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467, 82 S. Ct. 486, 7 L.Ed.2d 458 (1962). The burden is on the moving party. *Mt. Pleasant*, 838 F.2d at 273. After the moving party discharges this burden, the nonmoving party must do more than show that there is some doubt as to the facts. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L.Ed.2d 538 (1986). Instead, the nonmoving party bears the burden of setting forth specific facts showing that there is sufficient evidence in its favor to allow a jury to return a verdict for it. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L.Ed.2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L.Ed. 2d 265 (1986).

In passing on a motion for summary judgment, the court must review the facts in a light most favorable to the party opposing the motion and give that party the benefit of any inferences that logically can be drawn from those facts. *Buller v. Buechler*, 706 F.2d 844, 846 (8th Cir. 1983). The court is required to resolve all conflicts of evidence in favor of the nonmoving party. *Robert Johnson Grain Co. v. Chem. Interchange Co.*, 541 F.2d 207, 210 (8th Cir. 1976). With these principles in mind, the Court turns to an examination of the facts.

Plaintiff Reliance Insurance Co. is the insurer and provider of the policy in question to Bank Building and Equipment Corporation (BBC). Defendant BBC is a Delaware corporation (headquartered in St. Louis) now liquidated pursuant to Chapter 11 proceedings. Defendant Clements was President and General Manager of the Loughman Division of BBC and the Loughman Corporation, a wholly-owned subsidiary of BBC. Defendant Weis was the Chief Executive Officer of BBC from 1983 through April 1989. Defendant Carpenter was Chief Financial Officer of BBC from 1983 through December 1989.

On April 30, 1990 BBC filed for bankruptcy protection under Chapter 11 of the United States Bankruptcy Code. On July 22, 1991 a liquidation plan (named the First Amended Joint Plan of Liquidation of BBC and known simply as the "Plan") filed on behalf of BBC and two of its subsidiaries was approved by the Bankruptcy Court in St. Louis. Pursuant to the Plan, the Plan Committee of BBC was formed to implement the Plan. According to the Plan, all causes of action belonging to the bankruptcy estate (of BBC) vest and shall be brought in the name of the Plan Committee. Richard Miller was appointed by the Plan Committee as Liquidation and Distribution Agent to act as the representative of the Plan Committee.

In November 1991, after an investigation initiated by the Plan Committee was concluded, Miller brought suit against defendants Weis, Carpenter, and Clements in the Circuit Court for the County of St. Louis. The suit was filed by the Plan Committee alleging breach of fiduciary duty and negligence in the defendants' management of BBC. The suit seeks recovery, for the estate of BBC, of over $50,000,000.00 in actual and punitive damages.

Notice of the civil action was given to Reliance, which had issued a directors and officers' liability policy to BBC. The defendants requested coverage for themselves with

regard to the state court action. Reliance denied coverage for the state court action (hereinafter referred to as Plan Committee action) pursuant to Endorsement 1 of the policy. The pertinent portions of the policy read as follows:

> The insurer will pay on behalf of the Directors and Officers all loss which the Directors and Officers or any of them shall become legally obligated to pay as a result of any claim or claims first made during the policy period against the Directors and Officers, individually or collectively, for a Wrongful Act. (§ IA)
>
> Wrongful Act is defined as: any actual or alleged ... neglect or breach of duty by the Directors and Officers in the discharge of their duties, individually or collectively, or any matter claimed against them solely by reason of their being Directors or Officers of the Company. (§ IVC)
>
> It is agreed that Section V "EXCLUSIONS" shall be amended by the following:
> (the Insurer shall not be liable to make any payment for loss in connection with any claim made against the Directors and Officers:)
> by or on behalf of a Director and/or Officer or by or on behalf of the Company, except for stockholder(s) derivative actions brought by a shareholder(s) of the Company other than a Director and/or Officer. (§ V and Endorsement 1)
>
> "Company" is defined in the policy as "the Company shown in Item A of the Declarations and any subsidiary or subsidiaries as hereinafter defined." (§ IVA) (BBC is the only "company" named in Item A.)

Plaintiff Reliance claims that under Endorsement 1 (an exclusion clause commonly referred to as an "insured v. insured" exclusion clause), plaintiff is not liable for payment of any losses in connection with any claim made against any Director or Officer brought *by or on behalf of the Company.* Plaintiff contends that the Plan Committee is asserting claims on behalf of BBC against defendants Weis, Carpenter, and Clements. Consequently, plaintiff argues that the Plan Committee action falls within the "insured v. insured" exclusion clause of Endorsement 1. Defendants provide three (3) theories as to why Endorsement 1 is not applicable. They argue 1) the exclusion clause is ambiguous, therefore it must be construed in favor of the insured (and not the insurer plaintiff); 2) the Plan Committee action is not brought on behalf of BBC, but rather brought by Miller, as agent for the Plan Committee, on behalf of the bankruptcy estate of BBC (a separate legal entity); and 3) the Plan Committee action is in reality a shareholders derivative action and therefore not within the exclusion of Endorsement 1.

Before embarking on a somewhat difficult road to finding an answer to the issues raised by the summary judgment motions, the Court must first address the preliminary jurisdictional issue of what law controls. This case presents itself with two levels of analysis. On one level, this is a case about interpreting a clause in an insurance contract; consequently state law will control, but which state? Secondly, interpretation of the clause in question involves application of bankruptcy law since the insured has been liquidated under Chapter 11 of the United States Bankruptcy Code and its affairs are being managed under Chapter 7 of the Code.

The plaintiff agrees to application of Delaware law for purposes of the motions. Defendant Carpenter agrees also to application of Delaware law. Defendant Weis appears to be noncommittal as to which state law he favors. Both Missouri and Delaware apply the "most significant relationship" test of Section 145 of the *Restatement (Second) of Conflicts*

(1971) to resolve conflict of laws issues regarding the interpretation and validity of contracts. *Empire Petroleum v. D.F. & Associates. Inc.*, 538 F. Supp. 615, 619 (E.D. Mo. 1982); *The Travelers Indemnity Co. v. Ben E. Lake, et. al.*, 594 A.2d. 38 (Del. 1991).

However, in the present case, the insurance policy in question clearly states that Delaware law shall control in cases regarding interpretation and application of the policy. Section VI, subsection J. The federal rule on the enforcability of forum selection clauses requires that the clause should control and be enforced unless it can be shown that the clause is unreasonable and unjust, or that the clause is invalid because of fraud or overreaching, or that the suit is broader than the intended scope of the clause. *See, Carnival Cruise Lines, Inc. v. Shute,* 111 S. Ct. 1522 (1991); *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972); *Medicine Shoppe International v. Browne,* 683 F. Supp. 731, 733 (E.D.Mo. 1988). None of the defendants have raised any one of these contentions and the Court finds that none are applicable here, therefore this Court elects to apply Delaware law as to the interpretation and validity of the insurance policy at issue, especially with regard to Endorsement 1.

Under Delaware law, plaintiff Reliance has the burden of proving that Endorsement 1 applies in the present situation in order to avoid coverage. *New Castle County v. Hartford Accident & Indemnity Co.*, 933 F.2d. 1162, 1163 (3rd. Cir. 1991) (commonly referred to as *New Castle V*).

Generally, an insurance contract or policy is construed strongly against the insurer and in favor of the insured, unless there is some ambiguity in the policy language. *New Castle County v. Hartford Accident & Indemnity Co.*, 970 F.2d. 1267, 1270 (3rd. Cir. 1992) (commonly referred to as *New Castle VII*); *Aetna Casualty & Suretv v. Kenner,* 570 A.2d. 1172, 1174 (Del. 1990); *Hallowell v. State Farm*

Mutual, 443 A.2d. 925, 926 (Del. 1982); *Grissom v. Nationwide Mutual Ins.,* 599 A.2d. 1086, 1088 (Del.Ch. 1991). When the language of an insurance policy is clear and unequivocal, the parties will be bound by its clear meaning. A Delaware court will not construe or twist the words in order to create an obligation which does not exist or to which the parties had not assented. *Kenner,* at 1174; *Hallowell,* at 926; *Grissom,* at 1088. However, if ambiguity does exist, it must be construed against the drafter of the policy, i.e. the insurer. *Hallowell,* at 926; *Grissom,* at 1088.

Simply because the parties may suggest alternative interpretations of particular contract language, does not automatically establish an ambiguity. An ambiguity exists only when the contract language is subject to two or more reasonable interpretations. *New Castle VII,* at 1270; *Kenner,* at 1174; *Hallowell,* at 926; *Grissom,* at 1088. "Because ambiguity lurks in every word, sentence, and paragraph in the eyes of a skilled advocate, absent a showing that the term has acquired a special meaning the question is not whether there is an ambiguity in the metaphysical sense, but whether the language has only one reasonable meaning when construed, not in a hypertechnical fashion, but in an ordinary, common sense manner." *New Castle VII,* at 1270; *see also, New Castle V,* 933 F.2d. at 1188; 2 Couch, Couch on Insurance 2d., § 15:17 at 177-78, 190 (Rhodes rev. ed. 1984). All relevant provisions of the insurance policy must be examined and read in concert, rather than a single passage in isolation. *Kenner,* at 1174; *Grissom,* at 1088.

In the instant matter, the parties disagree as to the interpretation and intent of the language contained in Endorsement 1 of the policy. In particular, the parties dispute the meaning of the phrase "by or on behalf of the Company". The parties agree that the Company is BBC; they also agree that the Plan Committee action was not brought "by the Company" since BBC has been liquidated; what they don't

agree on is whether the Plan Committee action was brought "on behalf of the Company".

This issue is complicated by the fact that BBC was liquidated in accordance with Chapter 11 of the United States Bankruptcy Code and its affairs are now being managed in accordance with Chapter 7 of the Code. The phrase "on behalf of the Company" takes on special meaning due to the bankruptcy. It is this Court's considered opinion that in order to assess whether or not ambiguity exists with regard to Endorsement 1, the phrase in question must be construed within the realm of bankruptcy law.

The Court has carefully reviewed the case law cited by the parties. Unfortunately, these cases are not extremely helpful in providing guidance to the Court. The majority of cases cited deal with exclusion clauses similar to the present one, however, the interpretation and application of the clause is limited to facts involving bank failures. The principles espoused are restricted to the unique situation of the FDIC or the RTC taking control of a failed bank. The present situation deals with a bankrupt corporation no longer physically or legally in existence as it had been before the bankruptcy. The Court is constrained to draw from the basic tenets of insurance law and bankruptcy law in order to resolve this matter.

The parties contend that other provisions in the policy support their respective positions. There are other provisions in the policy that address the parties' rights in the event of the bankruptcy of BBC. Section VIII(c) provides that plaintiff Reliance's coverage shall continue unabated in the event of BBC's bankruptcy. Endorsement 4 states that the applicable officer and director retention (under Item D) shall be reduced from $150,000.00 to $2,500.00 if the insured company (BBC) becomes a debtor under Chapter 11 of the Bankruptcy Code and is unable to reimburse its officers for any liability covered by the policy. The parties argue that the existence of these other "bankruptcy" provisions in the policy are

significant to the Court's interpretation and application of Endorsement 1. Plaintiff Reliance contends that since the parties' rights in the event of bankruptcy are expressly addressed under different provisions of the policy, if Endorsement 1 was also intended to address the parties' rights in the event of bankruptcy, i.e. that Endorsement 1 was not applicable, Reliance would have said so in the clause. Consequently, Endorsement 1 is applicable in the present case. The defendants, on the other hand, argue that Reliance could have expressly excluded claims by the bankruptcy estate of BBC but elected not to do so. They contend that since the policy does refer to parties' rights in the event of bankruptcy elsewhere, the failure to address the issue in Endorsement 1 or in the definition of "Company" demonstrates Reliance's intent not to include actions by the bankruptcy estate in Endorsement 1, i.e. Endorsement 1 not applicable in the present case.

Both sides present very plausible arguments to the Court. However, the Court believes that since Reliance is the drafter of the policy and did address the issue of bankruptcy elsewhere in the policy, then it appears reasonable to conclude that if Reliance had wanted to expressly address the issue of bankruptcy in Endorsement 1, it would have done so. This is simply an observation of the Court to be considered in making its ultimate decision in this matter.

As stated before, the issue central to this case is what is meant, under bankruptcy law, by the phrase "on behalf of the Company". Plaintiff Reliance argues that liquidated BBC is now nothing more than a "bankruptcy estate" and as such encompasses all legal and equitable interests and property held by BBC as of the date of filing the bankruptcy petition. Reliance further argues that the Plan Committee, as representative of the bankruptcy estate, can only bring claims belonging to BBC, thus the state civil action is "on behalf of the Company" and is excluded from coverage pursuant to Endorsement 1. Defendants, on the other hand, argue that the

filing of a bankruptcy petition divests the debtor of all rights in the property of the estate and vests all such rights in the trustee. They further argue that the trustee is a newly created juridical entity with his/her/its own rights and duties and subject to the control of the bankruptcy court. The defendants aver that Miller and the Plan Committee, are akin to a trustee, and thus are working not for BBC but rather on behalf of the bankruptcy estate for the sole benefit of the creditors and shareholders of the liquidated BBC.

What is an estate under the bankruptcy laws? What purpose does the Plan Committee serve? The answers to these two questions is paramount to the Court's resolution of the problem before it.

The bankruptcy estate is created upon the filing of the petition for bankruptcy; as in this case pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101 *et. seq.* Section 541 of the Code establishes that the filing of the bankruptcy petition creates an estate and defines which property comprises the estate. Subsection 541(a)(1) defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." *See, In re Ozark Restaurant Equipment Co., Inc.,* 816 F.2d. 1222, 1224-25 (8th Cir. 1987). This includes all choses in action and claims by the debtor against others. It is significant that the definition of the estate enbraces causes of action belonging to the *debtor* at the time of the commencement of the action. *Ozark Restaurant,* at 1225. Thus, under the provisions of Section 541, the estate succeeds to any right of action a debtor corporation may have to recover damages for misconduct, mismanagement, or neglect of duty by a corporate officer or director, and the trustee has the authority to bring such actions on behalf of the debtor corporation. *Ozark Restaurant,* at 1225. However, a trustee (or as in this case, a liquidation and distribution agent), stands in the shoes of the debtor corporation in prosecuting a cause of action belonging to the debtor, and where the applicable state law makes such

obligations or liabilities run to the corporate creditors personally, rather than to the corporation, such rights of action are not assets of the estate pursuant to Section 541(a) that are enforcable by the trustee or liquidation agent. *See,* 4 Collier on Bankruptcy, § 541.10[8] (15th ed. 1986).

As regards insurance policies, directors' and officers' liability (D&O) policies or otherwise, some courts have found that the policies are part of the estate, although the proceeds may not be. *In Re Daisy Systems Securities Litigation,* 132 B.R. 752 (9th Cir. 1991); *In Re Louisiana World Exposition,* 832 F.2d. 1391 (5th Cir. 1987); *In Re Minoco Group of Companies, Ltd.,* 799 F.2d. 517 (9th Cir. 1986). In *Louisiana World Exposition,* the Fifth Circuit took pains to point out an important factual and procedural distinction among suits where the directors' and officers' liability coverage was at issue. It noted that "[h]ere, the suit calling the liability coverage into play is one brought by the Committee on behalf of the debtor, LWE. The object of that action is to enlarge the debtor's estate." *Id.,* at 1400. The Court noted that this distinguished its case from other cases in which plaintiffs were not suing for the debtor's benefit but rather for their own personal benefit. *Id.,* at 1400.

In the present case, there is no dispute that BBC had a right of action, such as the pending state Plan Committee action, at the time of the filing of its bankruptcy petition. Under the Code, this right of action became part of the bankruptcy estate. Furthermore, none of the parties have cited any Delaware caselaw which makes an action, such as the pending state Plan Committee action, personal to the corporate creditors rather than the corporation itself. The claims asserted in the Plan Committee action could have been brought by BBC and although they were not, "the estate's legal and equitable interests in property rise no higher than those of the debtor." *In Re Louisiana World Exposition,* at 1399, citing *In re Gagnon,* 26 B.R. 926, 928 (Bankr.M.D.Pa. 1983). It is clear that whenever a cause of action "belongs"

to the debtor corporation, the trustee, or in this case, the liquidation and distribution agent, simply has the authority to pursue that cause of action. *See, Ozark Restaurant,* at 1225.

This brings us to the second question as to the role that the Plan Committee (and to a smaller degree, the liquidation and distribution agent Miller) plays in BBC's bankruptcy. The answer to this inquiry lies in the terms of the Liquidation Plan and the Disclosure Statement filed in BBC's bankruptcy case.

In the First Amended Joint Plan of Liquidation of BBC, confirmed by the Bankruptcy Court in July 1991, the Liquidation and Distribution Agent and the Plan Committee are defined as follows:

> 1.20 **Liquidation and Distribution Agent** shall mean the individual appointed by the Plan Committee, who shall on the Confirmation Date be vested with authority to administer all the property of the Consolidated Debtors and their estate including causes of action and all proceeds from the liquidation of such property and who shall have the right and duty to receive, reinvest, and distribute all such property in accordance with the Plan and under the supervision and direction of the Plan Committee.
>
> 1.31 **Plan Committee** shall mean the Committee of three individual creditor representatives, selected on behalf of BBC by the BBC Unsecured Creditors Committee appointed in BBC's case pursuant to 11 U.S.C. § 1102(a)(1), and on behalf of MBI and API by each Debtor from its solicitation of its list of twenty largest unsecured creditors, excluding those which have a conflict of interest, which Plan

> Committee shall function as of and after the Confirmation Date.

BBC Liquidation Plan, Article I. Under Article XII of the Liquidation Plan (**Means For Execution of the Plan**), the Plan contemplates not only liquidation but also "the prosecution of any and all claims or causes of action held by the estates of the Consolidated Debtors by the Plan Committee ...". Article XII, Subsection 12.1. Article XII goes on to discuss the appointment of the Liquidation and Distribution Agent and states that "[o]nce appointed, the Plan Committee, by the Liquidation and Distribution Agent shall be responsible for prosecuting and defending any and all claims and causes of action relating to the Consolidated Debtors' estate, including, without limitation (1) claims of each estate against any Person (including, without limitation, any claims or causes of action arising under Sections 544, 545, 547, 548, 549, and 553(b) of the Bankruptcy Code) ...". Article XII, Subsection 12.3.

Article XIV of the Liquidation Plan describes the Plan Committee in detail and outlines its duties and responsibilities. Subsection 14.1 stipulates that the Plan Committee shall have the same authority to act for the Consolidated Debtors as a board of directors for each of the Consolidated Debtors. It goes on to state that following confirmation, "all causes of action belonging to any of the Consolidated Debtors shall vest and be brought in the name of the Plan Committee, on behalf of the particular Consolidated Debtor or Debtors in which the cause of action had been previously vested." With regards to the creditors and shareholders, Subsection 14.7 states that the Plan Committee "shall act in a fiduciary capacity ...".

Finally, Article XVIII discusses retention of jurisdiction by the Bankruptcy Court. Subsection 18.1(a) states that the Bankruptcy Court shall retain jurisdiction in order for and to enable "the Plan Committee and the Liquidation and

Distribution Agent, for and on behalf of the estate to ... determine the extent that the Directors and Officers Liability Policy of Insurance provides coverage for the acts or omissions of the officers and former officers of BBC, and to recover any preferences, transfers, assets or damages to which the estates of the Consolidated Debtors may be entitled ...".

The First Amended Disclosure Statement (filed in conjunction with the Liquidation Plan) addresses the purpose and goals of the Plan Committee and the Liquidation Plan.

In Section VI. **PLAN COMMITTEE**, the Disclosure Statement notes that "[b]ecause the Plan Committee will consist of creditors of BBC, API, and MBI, it will be able to provide broad based representation for the Consolidated Debtors."

In Section VII. **THE PLAN OF LIQUIDATION**, the Disclosure Statement points out that once the business affairs of the Consolidate Debtors is liquidated, "the only continuing affairs of the Consolidated Debtors will be the pursuit of additional recoveries through legal actions that are pending or instituted in accordance with the Plan." The Consolidated Debtors affairs are to be monitored and supervised by the Plan Committee. The Agent is authorized to take whatever legal actions are necessary "in the name of and on behalf of the Consolidated Debtors." The Plan is to operate like a Chapter 7 liquidation under the Bankruptcy Code and the "duties of the Chapter 7 Trustee are executed by the Plan Committee and the Agent." Finally, the "overriding goal and purpose of this Plan is speedy, efficient and economical liquidation of the Consolidated Debtors and the distribution of all available funds to creditors."

It is this Court's considered opinion that pursuant to the Bankruptcy Code, the Liquidation Plan, the Disclosure Statement, and the relevant caselaw, whatever right of action BBC had against its former officers for mismanagement and

breach of fiduciary duty was transferred to the bankruptcy estate upon the filing of its bankruptcy petition. Once BBC was liquidated, Agent Miller and the Plan Committee were obligated to pursue BBC's right of action in order to recover assets for BBC's estate. The purpose of the pending state court action is to recover all available funds for distribution to BBC's creditors. It is clear that the pending state court action was filed on behalf of BBC and its estate, although the benefits sought may eventually inure to the creditors. For purposes of this litigation, there is no significant legal distinction between BBC and its bankruptcy estate.

With regard to the defendants' assertion that the pending state court action is in reality a shareholder's derivative action, the Court finds this contention meritless. None of the prerequisites, under Delaware law, for filing a shareholder's derivative action have been met. *See,* Chancery Court Rule 23.1, DEL. CODE ANN.; Delaware Corporation Law Annotated, § 327. Nowhere in the state court complaint is it stated that the claims are derivatively asserted on behalf of BBC's shareholders. The Court finds that the pending state court action is not a shareholder's derivative lawsuit.

The Court concludes that the pending state court action was filed by Agent Miller and the Plan Committee on behalf of BBC and its estate against defendants Weis, Carpenter, and Clement for mismanagement and breach of fiduciary duties. It seeks over 50,000,000.00 in actual and punitive damages. Any award of damages would go into the estate for future distribution to creditors.

There is no ambiguity in the language contained in Endorsement 1. Any lawsuit brought on behalf of BBC against its former officers falls within this exclusion clause. Such a lawsuit is presently pending in the Circuit Court for the County of St. Louis; therefore, Endorsement 1 is applicable. Coverage for defendants Weis, Carpenter, and Clements is excludable under the policy.

Summary judgment will be granted for plaintiff Reliance and against defendants Agent Miller, Plan Committee, Weis, Clements, and Carpenter on the merits of plaintiff's declaratory judgment complaint.

Dated this 18th day of December, 1992.

/s/ Stephen N. Limbaugh

UNITED STATES DISTRICT JUDGE

D. THE COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Reliance Insurance Company of Illinois, Plaintiff-Appellee, vs. Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation, Defendant-Appellant.	Appeal No. 93-1259EMSL
Reliance Insurance Company of Illinois, Plaintiff-Appellee, vs. Carl J. Weis, Jr., Defendant-Appellant.	Appeal No. 93-1260EMSL

Appeal from the United States District Court
for the Eastern District of Missouri.

[UNPUBLISHED]

Submitted: September 13, 1993
Filed: September 23, 1993

Before HANSEN, Circuit Judge, LAY and BRIGHT, Senior Circuit Judges.

PER CURIAM.

In case No. 93-1259 involving the appeal by the Plan Committee of Bank Building and Equipment Corporation of America, In Liquidation, the judgment of the district court is affirmed on the basis of the well-reasoned opinion of the district court.

In case No. 93-1260, on the basis of the affirmance of the summary judgment entered in case No. 93-1259, the judgment of dismissal of the counterclaim of Carl J. Weis, Jr. for breach of contract is likewise affirmed.

See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK,

U.S. COURT OF APPEALS, EIGHTH CIRCUIT.